APPENDIX B

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

Report and Decision	*	
In the matter of	*	
United states Department of	*	
Housing and	*	
Urban Development	*	
and	*	Arbitration #92-05883
		December 9, 1992
Richard Frazier	*	
Grievant	*	

Arbitrator: Joseph Glasser
15 Westwood Road
Storrs, CT 06268

INFORMATIONAL DATA

The arbitrator was appointed by the Federal Mediation and Conciliation Service by letter dated April 29, 1992. The date for hearing was established by the parties as July 27, 1992 and July 28, 1992, and the location was the HUD offices in Hartford, Connecticut. The time of the hearing was set at 11:00 a.m.

The hearing was held on the appointed date at the place and time established above. Representing the Department of Housing and Urban Development regional office in Boston, MA was Mr. Robert Farrell, Attorney and representing the Grievant, Mr. Otto Witt, attorney.

The arbitration hearing on July 27th was from 11:00 a.m to 3:45 p.m. and on July 28th from 9:30 a.m. to 11:20 a.m.

The attorney for the Department of Housing and Urban Development indicated that he would provide a post-hearing brief. The grievant's attorney would not be submitting a post hearing brief but was informed by the arbitrator that he could submit a rebuttal brief if he chose to do so.

After receipt of the transcripts, the agency's post-hearing brief was submitted what was then followed by the rebuttal brief submitted by the grievant's attorney.

Prefatory Statement

The arbitrator's statement to the attorneys indicated that all evidence that is to be introduced into the record must be done during the hearing. The reasons stated by the arbitrator for this requirement are that the arbitrator will know that both parties will be aware of what each has brought into evidence, and have the opportunity to question the accuracy and the relevancy of that evidence and to bring before the arbitrator countervailing evidence. The arbitrator informed the attorneys that any post-hearing briefs were for the purpose of clarifying matters raised during the hearing and/or providing any citations with full discussions of their relevancy to the evidence presented at the hearing.

The arbitrator brought to the attention of the attorneys that the purpose of an arbitration hearing is for the arbitrator to evaluate all evidence brought before him after an opportunity is provided to each party to fully state its position, present its evidence, and its witnesses, as well as rebut the opposition's position, question its evidence and cross-examine its witnesses (TR P 69-70-, 79-80). Only after the parties have completed this procedure, without restraint except when the arbitrator deems it necessary, can the arbitrator prepare an analysis of the information provided at hearing and supplemented by the party briefs, if they have chosen to submit them. This analysis is then the basis of the award and decision that the arbitrator files with the appointing agency and submits to the parties. It should also be stated that the arbitrator takes into consideration

aspects of evidence and testimony that have not been presented at the hearing but that are felt to significantly impinge upon the case.

REPORT OF ARBITRATION

Subject of Arbitration

The submission clause agreed to by the parties at the outset of the hearing is as follows:

a) Does the action of the agency, Department of Housing and Urban Development, violate Section 20.05 (5) of the collective bargaining agreement relating to suspension as to timeliness? Is the action timely under Section 20.01 (5) of the agreement?

b) Was suspension for just cause? If no, the there should be a recision of the discipline and the grievant be made whole for the pay and any benefits that accrued during the period November 17, 1991 to January 15, 1992.

Facts of the Case

The facts of the case as presented in the section have been assembled from testimony presented at the hearing and relate only to those matters which impinge directly upon the issues on which the arbitrator is to rule.

Regarding the Issue-Timeliness

On May 3, 1991, the grievant, Richard Frazier, through his attorney, submitted a response to the proposed action of the agency to discipline him for "sexual harassment and notoriously disgraceful conduct." It was not until June 19, 1991 that the agency sent a letter indicating that it requires further investigation of the matter. The agency did not send further letters notifying Richard Frazier's attorney that it (HUD) was extending the time limit for issuance of the decision. HUD indicted that there was an apparent misunderstanding between the parties. HUD was attempting to give the grievant's attorney an opportunity to further defend the grievant and on July 11, 1991, sent newly-received affidavits for his review and comment. Since the grievant's attorney had moved, this material was returned and subsequently sent to the attorney's new address. The agency then waited for his comments. It was not until October 1, 1991 that the agency contacted the grievant's attorney and was informed that he had no comments about the affidavits. The agency issued its final decision on October 29, 1991.

Regarding the Issue-Conduct of the Grievant

The agency presented five witnesses that testified to the conduct of the grievant. All of these witnesses claimed they were subjected to verbal statements of sexual nature and/or heard Mr. Frazier make verbal statements of a sexual nature to others directly or about others indirectly (seeing women passing outside and making statements of a sexual

nature about them). On cross examination of some of these witnesses, there were some discrepancies between what they had testified to at an earlier date and their testimony at the hearing. One of the witnesses testimony went back to 1977. At least two of the witnesses testified that Mr. Frazier had made statements to them claiming he was the father of their sons.

Analysis of the Facts

Regarding the Issue of Timeliness

In order for the arbitrator to analyze the preceding facts as to timeliness, it is necessary to examine carefully the collective bargaining agreement between the agency, US. Department of Housing and Urban Development and the union, American Federation of Government Employees AFL-CIO. The relevant portion of this agreement is Section 20.05 (5). This states "A written decision .... shall be made within 35 days of the receipt of the employee's response ...". The mandatory aspect of the "shall" is negated by a later statement, "If management determines that further investigation is necessary, the time limit for issuance of the decision shall be extended". There is nothing in the clause which states when management must make this determination or when it must notify the employee of its decision (to extend the time limit), only that the employee shall be notified and shall continue to be notified at 30 day intervals thereafter. Based on the wording of this section, the June 19, 1991, letter sent by the agency fulfills its obligation under the agreement. HUD

may have erred by not sending 30 day letters of extensions, but the reason for extending the time period was to provide the grievant's attorney additional time to evaluate material it had not had earlier for the benefit of the grievant. In the arbitrator's opinion, an attempt to provide further due process which the agency could have reasonably assumed was notification to the employee (through his attorney), was a satisfactory substitute for a 30-day letter to the employee.

Regarding the Issue-Conduct of the Grievant

Despite the inconsistencies in the testimony of some of the witnesses, the evidence as presented by the agency is judged to meet the preponderance of evidence quantum of proof. Whether the grievant said what he said as often as it was thought by some of the witnesses, or whether the effect on the witnesses was as devastating to some of the witnesses as was claimed to have been the case, is not material. What is material, is that the evidence is sufficient to show that the grievant did make many statements of a sexual nature directly to the witnesses or indirectly relating to females passing outside in the presence of the witnesses, as well as other statements to some of the witnesses which they found distressful and which were heard by some of the other witnesses.

Arbitrator's Opinion

The first question to which the arbitrator must

respond is, Does the action taken by the agency violate Section 20.05 (5) and Section 20.01 (5) of the agreement as to timeliness?

In the analysis of the facts in a preceding section regarding the issue of timeliness, the arbitrator has ruled that the letter dated June 19, 1991, sent by the agency meets the timeliness requirement of the agreement and fulfills its obligation under the agreement.

The second question to which this arbitrator must respond is: Was the 60-day suspension of the grievant for just cause?

There is no doubt that the verbal statements by Mr. Richard Frazier to the witnesses could be perceived by most as no less than notoriously disgraceful conduct. How was the conduct perceived by Mr. Richard Frazier? The grievant has acted in this manner since 1977 as one witness testified. In all likelihood Mr. Frazier, who had twenty-five (25) years of Federal Service, has been conducting himself in 1991 as he did in all of the preceding 25 years of Federal Service, has been conducing himself in 1991 as he did in all of the preceding 25 years of employment. Mr. Richard Frazier even made sexual comments about women he saw walking past the agency's windows that were heard by the witnesses. It would seem that this is Mr. Frazier's lifestyle.

It is inconceivable that no agency supervisor personnel in all of 25 years of the grievant's employment, could have not heard any of his sexually explicit statements

about women walking by the office window. There was no evidence presented that any supervisory personnel ever brought to the grievant's attention that his conduct was unacceptable, and that his statements were considered to be sexual harassment. Supervisory personnel should have made clear that the continuation of this conduct by Mr. Frazier was against public policy and subject to disciplinary procedures.

There is evidence (Exhibit 5-9), although not presented by the agency, so that its full meaning cannot be determined and its import cannot be evaluated by the arbitrator because it was not open to examination by the grievant's attorney, that Mr. Frazier certified that he had "read the Summary of Standards of conduct distributed at this Meeting" (dated Nov. 4, 1981). It is presumed by the arbitrator that this may refer to exhibit 5-7 which refers to a "Policy Statement and Definition on Sexual Harassment" dated March 7, 1980. The arbitrator can only make the presumption because there was no reference to this exhibit during the arbitration hearing, but is the only evidence that is close to the date of Exh. 5-9

The question that enters the arbitrator's mind is: Even though the employee has signed his name that certifies he has read whatever that he was given, how much significance does he give Nov. 4, 1981 to a document dated March 7, 1980? It would seem that whoever passed out the document (which could easily have been one of ten of twenty other documents passed out at a meeting of employees) did not see this document, based on the date, as

having much importance if being disseminated at such a late date, so that he probably made no mention of it. It is further presumed that if the document had been given special attention as to its importance, this would have been given the full attention of the agency in its presentation to the arbitrator.

In the arbitrator's opinion, the passing out of a document at a meeting, even with a certification by the employees that whatever may have been passed out at a meeting was read, is not determined to be a satisfactory management presentation of such a serious topic.

There is no question in the arbitrator's mind that sexual harassment is whatever is perceived by the person who is subjected to the sexually explicit statements of another, especially when it is laced with "gutter expletives."

There is another aspect of the sexual harassment issue that should be examined. The question to be evaluated: At what point is a person who makes statements to another which are patently notorious disgraceful and contrary to acceptable conduct by most of society and has been determined to be "against public policy" by law, guilty of sexual harassment? An analogy that is appropriate to this question can be found in criminal law: The killing of one person by another is obviously contrary to public policy and there would be no question in anyone's mind that the act of killing would rank first. If it is proven in court (whatever that might mean), that a person who has killed someone, does not know right from wrong, that person is not found

guilty of murder, a crime against public policy. Therefore, any other conduct which by law, is against public policy, should be evaluated similarly. When the grievant's conduct was being evaluated by Mr. Harold G. Thompson in Exh 5, this concept was tangentially referred to by the statement "Mr. Frazier knew or should have known that the type of behavior exhibited by you would not be tolerated."

The significant question that the arbitrator raises: Did Mr. Frazier know or should have known that his conduct was sexual harassment? Why should Mr. Frazier know or should Mr. Frazier have known this? The only evidence presented by the agency that the grievant know or should have known was the signed statement that Mr. Frazier certified that he read some documents given to him. Even this evidence as presented without being given any attention by the agency's attorney during the hearing lacks great credibility as to what was to be read, and if even this had been proven, no other emphases is given to a document that is over one and a half years old. The importance ascribed to such a document by management approaches zero.

In the arbitrator's opinion, Mr. Frazier did not know right from wrong; that his conduct was contrary to public policy, let alone know that his sexually explicit statements directly made to a number of women exhibited notoriously disgraceful conduct or even that his several outbursts in the office, sexually describing women passing outside and his desires as they pertained to these woman, were unprofessional and lacked good taste.

The arbitrator is of the belief that Mr. Frazier's behavior had not undergone any change during the 25 years of service preceding the issuance of the 60-day suspension notice, that his conduct in the office had never been any different. There was no evidence presented that anyone, in management had ever brought to Mr. Frazier's attention that it is not acceptable conduct in the office to publicly express his sexual desires about women passers-by outside the building. Further, there was no evidence presented that agency management had ever brought to Mr. Frazier's attention, by requiring his attendance at a meeting, the significance of sexual harassment under the law, and the penalties that would be invoked for conduct by the agency personnel.

Arbitrators' Decision and Award

The grievant is not guilty of sexual harassment so that the 60-day suspension was not for just cause.

The record of this disciplinary action should be expunged from the personnel file of the grievant and the agency is to make the grievant whole for any pay and benefits lost during the 60-day period of suspension.

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Joseph Glasser